

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA, EX
REL. MICHAEL N. SWETNAM, JR.,

Plaintiff,

 \mathbf{v}_i

VALLEY BAPTIST HEALTH
SYSTEM and VALLEY BAPTIST
MEDICAL CENTER

Defendants.

CIVIL ACTION NO. 1:08-CV-446

MOTION FOR LEAVE TO SUPPLEMENT THE SUMMARY JUDGMENT RECORD

Defendants, Valley Baptist Health System and Valley Baptist Medical Center, (collectively, “Valley Baptist”) file this Motion for Leave to Supplement the Summary Judgment Record, and in support thereof would show as follows:

1. On April 30, 2014, the Court signed an Amended Scheduling Order, ordering the parties to file dispositive motions by July 31, 2014.¹ On that date, Valley Baptist filed its Motion for Summary Judgment regarding Relator Michael N. Swetnam, Jr.’s (“Relator”) False Claims Act Claims (the “Motion for Summary Judgment”).² As is set forth in the Motion for Summary Judgment, Valley Baptist is entitled to summary judgment for at least two reasons: (1) Relator admitted the XOL Program was never based upon the physician’s referral of any patient to Valley Baptist; and (2) Relator lacks any evidence that the XOL Program’s purpose was to induce referrals.³

¹ Doc. 94.

² Doc. 106.

³ See Doc. 106.

2. Due to scheduling issues among the parties and their counsels, Valley Baptist could not depose Relator until after the Court's dispositive motion deadline. During his deposition, Relator repeatedly testified about why Valley Baptist implemented the XOL Program and also about the XOL Program's purpose. This Court should grant Valley Baptist leave to supplement the summary judgment record with Relator's testimony, portions of which are attached to this motion as Exhibit A (Relator's testimony about why the XOL Program was implemented) and Exhibit B (Relator's testimony wherein Relator admits the XOL's purpose was not to induce referrals).

3. Relator's testimony will assist the Court by narrowing the scope of items that require the Court's attention and serves the interests of justice. Specifically, Relator's deposition testimony establishes the following:

- Valley Baptist implemented the XOL Program in response to the medical malpractice crisis which impacted physicians' ability to obtain affordable medical malpractice insurance;⁴ and
- Inducing referrals was not the intent of the XOL Program.⁵

As Relator's attached testimony makes clear, the XOL Program was never based on the physician's referral of any patient to Valley Baptist.⁶ In summary, Relator's testimony contradicts his allegations in this lawsuit and supports the arguments in Valley Baptist's Motion for Summary Judgment. For this reason, the Court should grant Valley Baptist leave to supplement the summary judgment record.

4. Defendants' counsel conferred with Relator's counsel regarding his willingness to agree to this Motion for Leave. Relator's counsel agrees with Valley Baptist's Motion for Leave, on

⁴ Exhibit A, Relator's Deposition 37:22-38:4, 38:24-39:2, 39:21-24.

⁵ Exhibit B, Relator's Deposition 34:12-16, 34:20-35:10, 155:10-17, 156:14-21.

⁶ *Id.*

the condition that he be provided the option but no obligation to supplement the summary judgment record with testimony from Valley Baptist's former Chief Executive Officer, Ben McKibbens, within seven (7) days. Accordingly, this Motion should be considered agreed.

5. For the reasons set forth above, Defendants, Valley Baptist Health System and Valley Baptist Medical Center, respectfully request the Court grant their Motion for Leave to Supplement the Summary Judgment Record and order that the deposition testimony attached to this motion be part of the summary judgment record. Defendants also request such other and further relief as to which they may be entitled.

BOYARMILLER

By: /s/ Chris Hanslik
Chris Hanslik
Federal Id. No. 19249
State Bar No. 00793895
4265 San Felipe Road, Suite 1200
Houston, Texas 77027
(713) 850-7766 (telephone)
(713) 552-1758 (facsimile)
Email: chanslik@boyarmiller.com

ATTORNEY-IN-CHARGE FOR
DEFENDANTS VALLEY BAPTIST
HEALTH SYSTEM AND VALLEY
BAPTIST MEDICAL CENTER

OF COUNSEL:
BOYARMILLER
4265 San Felipe Road, Suite 1200
Houston, Texas 77027
(713) 850-7766 (telephone)
(713) 552-1758 (facsimile)
Email: mveech@boyarmiller.com
Email: esaldivar@boyarmiller.com

Donald H. Romano
Foley & Lardner, LLP
D.C. Bar No. 991132

3000 K Street NW, Suite 600
Washington, DC 20007-5109
(202) 945-6119 (telephone)
(202) 672-5399 (facsimile)
Email: DRomano@Foley.com

LOCAL COUNSEL:
Benigno (Trey) Martinez
Law Office of Benigno (Trey) Martinez
State Bar No. 00797011
1201 E. Van Buren
Brownsville, Texas 78520
(956) 546-7159 (telephone)
(956) 544-0602 (facsimile)
Email: Trey@martinezybarrera.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via ECF on this the 17th day of November, 2014 to:

Edward W. Allred
Francisco Guerra, IV
Mikal C. Watts
WATTS, GUERRA CRAFT LLP
300 Convent Street, Suite 100
San Antonio, TX 78205

Attorneys for Relator
Michael N. Swetnam, Jr.

/s/ Chris Hanslik
Chris Hanslik